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MICHAEL RODAK

IN THE

Supreme Court of the United States

No. 78-1451

MATTEO Di LORENZO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OCTOBER TERM, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner MATTEO DiLORENZO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming a conviction in the United States District Court for the Southern District of New York of the conspiracy count on a three count indictment, charging conspiracy to possess and distribute counterfeit money in violation of 18 U.S.C. §§371 and 472.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit not yet officially reported is printed as an appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 7, 1974. A petition for rehearing was filed and an order denying said petition was filed on February 28, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the search and seizure provisions of the Fourth Amendment and the due process clause of the Fifth Amendment, Sixth Amendment to the United States Constitution, which are as follows:

Fourth Amendment

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him."

STATUTORY PROVISIONS

§ 2518. Title 18 U.S.C.

1. Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the Court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that —

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian, or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the Court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

QUESTIONS PRESENTED

1. Was there probable cause set forth in the affidavits supporting the warrants in respect to the petitioner DiLORENZO?

2. Did the warrants themselves contain sufficient particularity

and were they executed in such a way to minimize the interception?

3. Was there sufficient independent proof that the petitioner DiLORENZO participated in a counterfeiting conspiracy.

4. Was the petitioner denied due process in allowing transcripts to be used by the jury with names of the alleged participants in the conversations and in allowing a partially recorded statement to be heard by the jury.

5. Insofar as applicable petitioner joins in the claims contained in his co-defendants' petitions to this Court.

STATEMENT OF THE CASE

The petitioner and four others were convicted after trial of conspiracy to possess and distribute counterfeiting money. Three others were convicted additionally of the substantive crime of knowingly possessing counterfeit money. Petitioner was acquitted on the substantive counts of the indictment. The sole direct evidence regarding the petitioner DiLORENZO consisted of four conversations of the petitioner, three with a co-defendant named SALLI and one with a co-defendant named RIZZO. The conversations are as follows:

The first conversation was dated April 19, 1972, at telephone No. 428-0533 (home of the petitioner)

Salli — Marty?

Delorenzo — Yeah.

Salli — Sam

Delorenzo — How are you?

Salli — Okay, did you call tonight?

Delorenzo — Yeah, ah, my friend is getting a little nervous waiting to hear from you.

Salli — Yeah, well, I was waiting till he was ready, I should be there Tuesday.

Dilorenzo — Tuesday.

Salli — Yeah.

Dilorenzo — Yeah.

Salli — If everything goes alright.

Dilorenzo — He, a, you know Teddy is away, you know.

Salli — Yeah, I just called over there.

Delorenzo — Yeah, you called there.

Salli — Yeah.

Delorenzo — Yeah, alright then I'll tell him to expect you Tuesday, yeah.

Salli — Yeah, and a, you know, but, tell him not to worry about it.

Delorenzo — Alright, then you'll call me and let me know.

Salli — Everything alright with that kid, ah Marty . . .

Dilorenzo — Yeah. . . .

Salli — I mean you know, no monkeying around, hah.

Delorenzo — No, he's afraid about you monkeying around.

Salli — No, don't worry about that.

Delorenzo — Okay.

Salli — Alright tell him not to worry about anything.

Delorenzo — Right.

Salli — You know me better than that.

Delorenzo — Yeah.

Salli — Okay.

Delorenzo — Right, so long.

The second conversation is dated April 26, 1972, on phone 428-0533 (Petitioner's home).

Delorenzo — Hello

Salli — Hello

Delorenzo — Yeah.

Salli — How are you?

Delorenzo — Alright, How are you?

Salli — Okay.

Delorenzo — Where are you?

Salli — I'm going to try to get down there tonight.

Delorenzo — Oh, yeah.

Salli — Its up to this — (few words inaudible).

Dilorenzo — I waited for you till late last night.

Salli — Yeah, I know.

Delorenzo — Yeah.

Salli — Listen Marty.

Delorenzo — Yeah.

Salli — Er, this kid that was supposed to come — come from there you know came back with me.

Delorenzo — Yeah.

Salli — He says, there's a chance that somebody was around with those things, you know, eh, you know what I'm talking about?

Delorenzo — No.

Salli — QUELLE DUE COSE (THOSE TWO THINGS) What I'm suppose to come with.

Delorenzo — Heah, yeah.

Salli — An he seen somebody, they tell him they want no part of it because somebody Vinnie is doing business with is an informant, could that be true.

Delorenzo — I don't think so, I heard there's something around but its not, I don't think its the same.

Salli — No, no, huh, okay I'm going to try and get down there tonight soon as this guy finishes up — he's supposed to finish up last night.

Delorenzo — Oh, well I'm glad, because there's some

people waiting here, you know?

Salli — Okay, I'll call — I'll call — I tried to get a hold of Teddy. He's not home this morning.

Delorenzo — Oh, he's away.

Salli — Oh, okay, can I get hold of you later somewhere? No?

Delorenzo — Er, no, cause I'm getting ready to leave the house now, I'm going to be a little busy.

Salli — Yeah, what time you get back home?

Delorenzo — Not till late tonight, what time you figure to be in?

Salli — Well that's why I want to call you up and let you know.

Delorenzo — Oh, I can pass by every once in awhile up there.

Salli — Where?

Delorenzo — Where I usually go, you know?

Salli — Yeah.

Delorenzo — And check with you by the bar.

Salli — No, I'm not going to go there.

Delorenzo — Oh, okay, alright then.

Salli — Is there some number I can call an you can call me, how about,

Delorenzo — You keep calling the house, and I'll keep calling the house and I'll get your message alright.

Salli — Alright.

Delorenzo — We'll do it that way.

Salli — Okay.

Delorenzo — I'll try to get your message that way.

Salli — Alright then.

Delorenzo — Okay.

Salli — Bye.

Delorenzo — Bye

The third conversation is May 2nd, 1972, on telephone No. 777-9761 (luncheonette).

(The legend of the transcript of that conversation bore the following:)

"It should be noted that first part of conversation not recorded due to machine malfunction. In substance Delorenzo directing Rizzo to Court St. and 3rd Place in Brooklyn."

Delorenzo — Brooklyn Bridge

Rizzo — Right

Delorenzo — And er — as you come off the bridge, go right for about two blocks then you make a left, that's on Court Street.

Rizzo — Make a right . . .

Delorenzo — Make a right off the bridge.

Rizzo — Is that where the Courts are and the Post office?

Delorenzo — Right, you know what I mean?

Rizzo — I got an idea . . .

Delorenzo — You make a right at the bridge and a left at Court . . .

Rizzo — Make a left on Court . . .

Delorenzo — Come straight out to third place . . .

Rizzo — Third place? Hold on let me write it down (pause) Okay, er, what's that Third Place?

Delorenzo — Yeah, that's like Third Street, like when you pass all the name you come to first, second, third place, you know what I mean?

Rizzo — Okay.

Delorenzo — Er — you know how to do it now?

Rizzo — Yeah, Court into Third place . . .

Delorenzo — Now, let me explain something to you now, here's what you do, here's what you do to make it easy for you, instead of coming to the end of the bridge, you know that cutoff?

Rizzo — Yeah. . . .

Delorenzo — You have to take the cutoff to go to the Belt Parkway.

Rizzo — Right . . .

Delorenzo — Take that cutoff . . .

Rizzo — Yeah . . .

Delorenzo — Now when you get off the bridge instead of making a right going that way make a left . . .

Rizzo — Make a left . . .

Delorenzo — Stay on that Court Street . . .

Rizzo — That's Court . . .

Delorenzo — In other words keep going . . .

Rizzo — Right, now I'm on Court I make a . . .

Delorenzo — On Court, go straight out all the name streets till you come to Third Place.

Rizzo — Yeah, Third, then I make a left . . .

Delorenzo — No on the corner at the bar . . .

Rizzo — Okay fine, I'll be there, by now.

Delorenzo — You understand, you're on your way now?

Rizzo — Righto, Okay, bye.

The Fourth conversation is dated May 3, 1972, on telephone 777-9761 (luncheonette)

Delorenzo — Hello

Salli — Yea

Delorenzo — Yea, how are you?

Salli — What's cooking?

Delorenzo — Nothing.

Salli — Nothing

Delorenzo — Hot dogs, I'm eating hot dogs.

Salli — Laughs, I'll be eating garbage cans pretty soon.

Delorenzo — Oh yea.

Salli — I, I don't know if that guy will go for that whatcha call it, I can't take the gamble Marty.

Delorenzo — Oh yea.

Salli — Know what I mean?

Delorenzo — Oh, wait till tomorrow, I'll be around to talk to you tomorrow.

Salli — What time?

Delorenzo — What time do you usually hang around.

Salli — OK, then I'll see you.

Delorenzo — Right.

The only other evidence relating to the petitioner DILORENZO was the testimony of the Government's principal

witness, HYMAN GRANT, who stated, "I was introduced to Mr. Martin (Defendant DiLorenzo) at the bar, but RIZZO told me not to discuss anything to do with the counterfeiting money in front of Mr. Martin".

Based on this evidence the Court of Appeals found there was sufficient independent evidence to establish DiLORENZO'S participation in a counterfeiting conspiracy.

REASONS FOR GRANTING WRIT

I

Since *Katz v. United States*, 389 U.S. 347 (1967) the probable cause requirement of the 4th amendment has been held to be applicable to electronic surveillance, particularly wiretapping and Congress in enacting, 18 U.S.C. 2518 (3)(a)(b) made probable cause a statutory requirement in wiretap warrants.

It is urged that the affidavits submitted in support of the warrants as they relate to the petitioner, DiLORENZO did not show sufficient probable cause.

The Court of Appeals in dealing with this question said, (Appendix A.)

> "The first claim is that the warrants authorizing the taps were not based upon probable cause and were not sufficiently particularized as to the offenses to be investigated. Without attempting to summarize the extensive affidavits accompanying the large number of requests for warrants, extensions, and amendments, suffice it to say that this Court has reviewed them and found that probable cause existed as to each appellant, upon which the warrants could be based, including conversations pertaining to assorted criminal enterprises, including extortion, burglary, illicit gambling, felonious assault, etc., etc. We further find that against this massive

backdrop of evidence of variegated criminal activity, the warrants described the offenses to be investigated with the requisite particularity. Cf. *United States v. Tortorello*, 480 F.2d 764, 778-81 (2d Cir.), cert. denied, 42 U.S.L.W. 3181 (U.S. Oct. 9, 1973."

However, the petitioner submits that with respect to him the affidavits submitted in support of the particular warrants, pursuant to which his conversations were admitted at the trial of this matter, did not recite probable cause.

Four conversations of the petitioner were admitted in evidence at the trial, the conversations of April 19, 1972 (exhibit 7A) and April 26, 1972 (exhibit 16A) were as a result of warrant No. 72/48, on telephone No. 428-0533, at premises 5312 Clearview Expressway, Queens, New York. (alleged to be petitioner's home).

The affidavit upon which it is based is some 32 pages long and was also submitted in support of another warrant, not in issue in this case and though many allegations are made regarding others the only thing that approaches probable cause relating to the petitioner is set forth hereafter.

The 1st statement is in paragraph 4f as follows:

"Martino DiLorenzo . . . is carried in the files of the New York City Police Department as a principal in the gambling operations in the County of New York. He is also identified by the Federal Bureau of Narcotics and the Internal Revenue Service as a prime figure in the narcotics trafficking situation in the City of New York. He is known to be a constant companion of Vincent Rizzo and George Rizzo. According to the Intelligence Unit of the New York City Police Department, DiLorenzo is very active as a soldier in the Genovese family of the organized crime cartel. It is believed that his nephew Anthony DiLorenzo, [illegible]224339, who is currently incarcerated for interstate

transportation of stolen securities, is the successor to Vito Genovese as the head of that family within organized crime. Matty DiLorenzo is also a prime figure in labor racketeering both in the garment industry and the air freight industry."

This is just a quotation from a previous affidavit used in support as to what is referred to as the lounge orders.

The second time the petitioner is mentioned is in paragraph "6a".

"Conversations intercepted pursuant to Court orders and the results of physical surveillance maintained by members of the District Attorney's Office Squad have confirmed that DiLorenzo and Rizzo are engaged in numerous illegal activities in which Rizzo performs the role of an enforcer carrying out DiLorenzo's orders. I am informed by Sgt. Nicholson that this fact is supported by his personal knowledge, the relative positions in organized crime assigned both persons by the intelligence units of the New York City Police Department, the manner and tone of voice in which each talks to one another and in which others address them, the actual acts that each perform, and the conversations that they have had. On many occasions those conversations are deliberately cryptic and it is only by accompanying them with known activities of Rizzo, DiLorenzo and their associates that they can be intercepted and their real meaning understood. The information set forth in the following paragraphs reveal the nature and scope of the activities engaged in by DiLorenzo and Rizzo and the use they make of the above captioned telephone in carrying them out."

Again this is just a summation of allegations with no substance or corroboration. The last statement is Paragraph 13 (l).

"I have been informed by FBI Special Agent William A.

Vericker that he has received information from an informant who has proven to be extremely reliable and knowledgeable during the past five years. According to William Vericker, said informant has given him information which has directly lead to the rest of two federal fugitives and of between 40 and 50 persons on charges relating to unlawful gambling activity. The basis of informant's information in the instant case, according to Special Agent Vericker, is conversations that informant has had with criminal associates of the persons named below. During the summer of 1967, informant told Vericker that a loanshark known to him as "Iddo" was fronting for Anthony "Tony Bucks" Carrolo, "Sara" Mogavero and "Mickey" DiLorenzo, when he loaned the owners of the Blue Sea Restaurant $150,000 at usurious rates of interest. According to the informant, Iddo held post dated checks of the owners of the Blue Sea which were to serve as the means of repayment. Shortly thereafter, Iddo died suddenly of what was officially reported as a heart attack. During the last week of August, the informant again spoke to Vericker and told him that Vincent Rizzo, Matty DiLorenzo and George "Lefty" Rizzo were holding in excess of $100,000 of post dated checks that the Greek owners of the Blue Sea Restaurant had given Iddo.

This information comes from an FBI agent who received from an unknown informer who received it from another unknown informer. It is hearsay three times removed.

There is nothing in the affidavit that corroborates the informers statements with regard to the petitioner, nor is there anything to indicate that the informant is reliable. What it amounts to in actuality is gossip.

This is exactly the kind of affidavit that was rejected by this Court in *Spinelli v. United States*, 393 U.S. 410 (1968). This Court in Spinelli rejected statements such as these stating,

"Finally, the allegations that Spinelli was "known" to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision."

The last 2 conversations are over telephone No. 777-9701 at J & W Luncheonette, 201 Avenue A, City of New York, Warrant No. 7245.

Again the affidavit in this case is some 33 pages long and the only mention of the petitioner DiLORENZO is an observation of the petitioner with co-defendant RIZZO, at which the following conversation was overheard, Paragraph 11,

"Marty DiLorenzo speaking to Vinnie Rizzo, Is that guy over there now?" Vinnie Rizzo's reply is inaudible. Marty DiLorenzo, "Check that account, I think you have to go back there Vincent."

This statement standing alone does not provide probable cause within the meaning of the 4th amendment, for the warrant as it applies to the petitioner.

It should be noted that at this point the affidavits contained no allegations regarding counterfeiting and while portions of conversations from previous orders show that perhaps there was probable cause as to others mentioned in this warrant. No conversation of the petitioner was submitted to the Court that would in any way substantiate a finding of probable cause.

It should be noted that these orders were only 2 of a series of some 31 orders covering 16 telephones and nowhere in the affidavits submitted up to this point was there a conversation involving this petitioner in any crime. At the time that this order went into effect (April 8, 1972) petitioner's telephone conversations had been intercepted for a period of 2 months. It is

clear that the affidavits as they apply to this petitioner contain no probable cause. Any evidence obtained by them should be suppressed.

II

As it was previously pointed out the only information that linked the petitioner in crime were allegations contained in the affidavit submitted, pursuant to warrant 72/48. However the warrants for telephone number 428-0533 provided as follows:

"It appearing from the affidavits of Frank S. Hogan District Attorney of the County of New York and Ronald Coldstock, Assistant District Attorney of the County of New York, said affidavits having been submitted in support of this eavesdropping warrant and incorporated herein as a part thereof, that there are reasonable grounds to believe that evidence of the felonies of Promoting Gambling, Possession of Gambling Records, Grand Larceny, Felonious Assault, Burglary, Criminal Possession of Stolen Property, Forgery, Criminal Possession of Forged Instruments, Possession of Dangerous Weapons, Criminal Usury and Conspiracy to commit said crimes may be obtained by intercepting certain wire communications transmitted over the above-captioned telephone line and instrument, and the Court being satisfied that comparable evidence essential for the prosecution of said crimes could not be obtained by other means, it is

ORDERED, that the District Attorney of the County of New York, or any police officer of the City of New York acting under the direction and supervision of said District Attorney is hereby authorized to intercept and record all telephonic communications of the persons described in the purporting affidavits herein, their co-conspirators, agents and associates as described and delineated in paragraph

12 of the herein incorporated affidavit of Ronald Goldstock, transmitted over the above-captioned telephone line and instrument and it is further"

There is nothing in the affidavit submitted in support of this warrant that would justify the kind of interceptions that were allowed by this warrant. The only possible crime that was alleged was criminal usury and even there as set forth in point I, there was no probable cause. While the order purports to particularize the crime and the persons whose conversations are to be intercepted, the orders themselves are so broad as to include practically any crime and any person who uses the phone.

The order also uses such phrases as "agents" and "co-conspirators".

This language while purporting to limit in effect, allows for a general search and as such is in violation of the 4th amendment. This order unlike the order considered by this Court *U.S. v. Kahn* — U.S. — Docket No. 72-1328 decided February 20, 1974 was not limited to particular conversations, nor was there any requirements that status reports be filed. Indeed the orders here allowed for a search of everything without the pre-requisite of status reports and further while the order purports to be limited to 30 days these were only 2 of a series of orders that preceded them and any series that were to follow. In all there were some 31 orders over 16 telephones and one bug and 844 days of electric surveillance.

The practical application of these orders was to allow the people who executed them virtual unfetted authority to listen to every conversation regardless of the people and regardless of the subject matter.

The crime for which the petitioner was convicted was conspiracy to violate the counterfeiting law. There is nothing in the affidavits submitted in support of these orders that would

warrant any reasonable grounds to believe that the petitioner was involved in counterfeiting. Indeed one of the purported purposes set forth in the affidavit submitted for the order (warrant 72/45) was the following statement by Mr. Goldstock, wherein he stated, "discover the nature and the scope and the other illegal enterprises in which the subjects are engaged as shown by their often cryptic conversations".

It is clear that the thrust of these orders were not to get evidence of a crime that was known to have been committed, or about to be committed, but was merely a search for general information.

It is further submitted that the execution of the wiretap warrants constituted a general search, in that the police officers in executing the wiretap warrant failed to follow the provisions of 18 U.S.C. §2518, Subdivision 5.

Prior to trial a motion was made to suppress the wiretap evidence on the ground that there was no effort made to minimize the interceptions (RA 22)*

At the hearing on minimization only 3 witnesses were produced; an Assistant District Attorney and 2 police officers who were present during some of the interceptions.

One Sgt. Nicholson, who was in charge of the entire investigation was not called by the Government. There was some conflict in the testimony. It became apparent that while all the conversations were not transcribed virtually every conversation was overheard. (T 154, 160) The wiretap conducted pursuant to the luncheonette order was a public telephone and there was no way the officers operating the plant could know who was making telephone calls until all conversations were heard (T 154, 159).

*RA refers to Record on Appeal, H refers to Minutes of Hearing and T refers to Minutes of Trial.

No findings of fact were made by the District Court as to what constituted a pertinent conversation or what was not a pertinent conversation.

The statistics submitted by the Government show that there were 113 conversations intercepted on the wiretap at the petitioner's home. Of this the Government alleged 70 instances where the machine was turned off because the conversation was social, 20 conversations were of a miscellaneous type, 11 conversations were improper and 13 that were pertinent (T page 631). Even using the Government's statistics in this respect, only 13 of the fully recorded conversations were pertinent and 11 of the fully recorded conversations were non-pertinent. This again is based on the Government's analysis of what is pertinent and what is not. Even accepting this analysis it is clear that no effort was made to minimize the interceptions, since almost as many non-pertinent were fully recorded as pertinent ones. It should again be noted that while the conversations may not have been recorded they were listened to.

III

The sole evidence concerning the petitioner's alleged participation in the conspiracy were his 4 conversations, 3 with the co-defendant SALLI and the 4th with the co-defendant RIZZO.

Petitioner urges that he was denied due process and the right to confront and cross-examine witnesses by the admission of hearsay to determine the merit and meaning of these conversations.

It should be noted that on none of the conversations was there any illusion to counterfeiting or any other crime. The conversations while possibly suspicious, did not give rise to any evidence to a sufficient prima facie showing of a counterfeiting conspiracy (C.F. *U.S. v. Spanos* 462 F2d 1012). (9 Cir. 1972) At most it showed that the petitioner knew the co-defendants.

However, a mere association between co-defendants is not sufficient to show participation in the conspiracy, *U.S. v. Ragland* 375 F 2d 471 (2nd Cir. 1967) Cert. denied 390 U.S. 925, *U.S. v. Fantuzzi* 463 F 2d 683 (2nd Cir. 1972).

The Court of Appeals is discussing this (Appendix A) stated the same independent evidence which established SALLI'S participation in the conspiracy, establishes DiLORENZO. However, in order to establish SALLI'S participation the Court had to look at hearsay utterances of other co-conspirators, which the petitioner could not cross-examine. Indeed the connecting link the Court found between SALLI and RIZZO was a conversation regarding 30 sweaters. However, again this conversation was hearsay with respect to the petitioner. It was the duty of the Government to establish independently that the 4 conversations of the petitioner referred only to the conspiracy alleged and that these 4 conversations established petitioner's participation in the conspiracy by a fair preponderance of evidence, *U.S. v. Geaney* 417 F 2d 1116 (2nd Cir. 1969) Cert. denied 397 U.S. 1028.

The sole link that the Court found was the petitioner's conversation with RIZZO wherein directions were discussed as will be discussed infra, this conversation was only partially recorded. In any event the conversation itself does not speak of meeting with anyone but concerns itself merely with directions.

The use of the 4 conversations to establish a counterfeiting conspiracy against the petitioner denied minimum due process.

IV

As was previously pointed out one of the conversations used as evidence of the conspiracy (exhibit 8B) bore the following legend:

"It should be noted that the first part of the conversation

was not recorded due to the machine malfunction, in substance DiLorenzo directing Rizzo to Court and 3rd place in Brooklyn."

Objection was made for the use of this recording on the ground that the recording was incomplete (T 679).

It is submitted that the petitioner was denied due process by allowing the recording to be played in it's incomplete form.

The Court of Appeals and apparently the jury relied heavily on this conversation and inferences that could be drawn from it. Further, since the conversation was incomplete this evidence should not have been admitted at all.

Since the first part of the conversation is incomplete the only part that remains is directions to a location. Any inference with these directions concerning a meeting would be prejudicial and deny this petitioner due process for he would then be in a position of having to contradict that which is unknown.

It is further submitted that the petitioner was denied due process in one other respect.

The Court of Appeals in discussing the identification of the petitioner's voice stated,

"We might tend to agree that the minimal exposure these detectives had to appellant's voice makes their identification doubtful."

The District Court in allowing transcripts to be used by the jury allowed them to be used with names identifying the voices.

Since these names were not used on the original tape recordings their use by the jury on the transcripts could only allow extra judicial evidence of petitioner's voice identification to be

used, in violation of due process and petitioner's right to confront and cross-examine witnesses. The written word has more impact than testimony allowing the jury to have transcripts identifying the petitioner's voice on the tape recordings so prejudiced him that he was unable to receive a fair trial.

In view of the Court of Appeal's finding that the testimony identifying petitioner's voice was doubtful, this error deprived the petitioner of a fair trial.

Counsel for the petitioner objected to this procedure (T 751, 752)

V

Insofar as applicable petitioner joins in the claims contained in his co-defendants petitions to this Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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CONRAD F. FERRIGNO
Of Counsel

APPENDIX A

OPINION OF THE COURT BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 385, 879, 450-51, 632, 505—September Term, 1973.

(Argued December 18, 1973 Decided February 7, 1974.)

Docket Nos. 73-2012, 73-2088, -2219, -2457, -2405, -2584

UNITED STATES OF AMERICA,

Appellee,

v.

VINCENT RIZZO, MATTEO DILORENZO, SAM SALLI, WILLIAM MIZONO and JAMES HEIMERLE,

Appellants.

Before:

FRIENDLY, FEINBERG and OAKES,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Southern District of New York, Robert L. Carter, *Judge,* convicting all appellants of conspiracy to possess and distribute counterfeit United States currency in violation of 18 U.S.C. § 371 and convicting appellants Rizzo, Salli and Heimerle of knowingly possessing counterfeit bills in violation of 18 U.S.C. § 472.

Convictions affirmed.

HENRY J. BOITEL, New York, N. Y., *for Appellant Rizzo.*

DAVID M. MARKOWITZ, New York, N. Y., *for Appellant DiLorenzo.*

STANLEY S. ARKIN, New York, N. Y. (Mark S. Arisohn, of counsel), *for Appellant Salli.*

HERBERT W. YANOWITZ, San Francisco, Cal. (Arkin & Horan, Herbert Monte Levy, of counsel), *for Appellant Mizono.*

JOSEPH FONTANA, Brooklyn, N. Y. (Edward A. Panzarella, of counsel), *for Appellant Heimerle.*

HENRY PUTZEL, III, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York; Barbara Sue Jones, Special Attorney, United States Department of Justice; S. Andrew Schaffer, Assistant United States Attorney, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This is an appeal from convictions arising from an attempt to distribute a large quantity of counterfeit United States currency. Appellants were all convicted of conspiring to possess and distribute counterfeit currency in violation of 18 U.S.C. § 371, and in addition, appellants Rizzo,[1] Salli and Heimerle were convicted of the substantive count of possessing counterfeit bills in violation of 18 U.S.C. § 472. A sixth defendant, Joseph Calise, was also found guilty of both the conspiracy and possession counts, but has apparently abandoned his appeal before this court. All of

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1 Appellant Rizzo is the same person whose narcotics convictions were affirmed by a panel of this court in *United States* v. *Rizzo*, Nos. 73-1941-43 (Jan. 17, 1974) slip op. 1489 (hereinafter *Rizzo I*).

the defendants were acquitted on the third count of transferring the counterfeit bills in violation of 18 U.S.C. § 473.

The Government's evidence was as follows: In the spring of 1972 appellant Rizzo was attempting to find outlets for a large quantity of counterfeit $50 and $100 bills he expected to receive shortly. He contacted Hyman Grant in an attempt to sell him a substantial portion, telling him that the bills would have 30 separate serial numbers, and he enlisted the aid of Fred Mayo in finding other buyers. Mayo contacted appellant Heimerle, who in turn contacted two friends in California, Calise and appellant Mizono, to see if they could dispose of the bills. Appellant Salli was to be the supplier of Rizzo's phony bills, and appellant Di Lorenzo acted as intermediary or perhaps as overseer of the Salli-Rizzo exchange. On May 2, 1972, the delivery of a certain amount of bills to Rizzo was completed following a call between DiLorenzo and Rizzo in which DiLorenzo gave directions as to where Rizzo should meet Salli. The bills, however, failed to have the 30 different serial numbers as originally indicated. This upset Rizzo, who complained in a phone call to Salli. Rizzo, nevertheless, gave the samples to Mayo who in turn gave them to Heimerle. Heimerle then mailed them to California, where Calise, on May 6, acknowledged receipt of the samples and said that he had passed them on to Mizono. The same day that Rizzo received the samples he sent a messenger to the house of William Benjamin in Philadelphia,[1] and on the next day Secret Service agents recovered in Philadelphia counterfeit bills later identified as identical to the samples shown Mayo the day before. On May 3 Rizzo and Mayo flew to Miami to show the samples to Grant as well as $80,000 in the counterfeit bills. Grant complained that the bills did not

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1 Benjamin was also involved in Rizzo's narcotics transactions. *Rizzo I*, slip op. at 1490-91.

have the promised 30 different serial numbers, and Rizzo and Mayo returned to New York. On May 9 or 10 Grant, now in New York, told Rizzo he had seen a newspaper story about an arrest of people passing counterfeit bills in Philadelphia; Rizzo said that it had been silly to send some of the bills to Philadelphia but there was nothing he could do now. On May 10 when Mayo asked Rizzo if certain counterfeiting arrests at Kennedy Airport involved their bills, Rizzo replied in the negative, but that the whole deal was off now. This information was passed along to Heimerle and Mizono.

The Government's case consisted of the testimony of both Grant and Mayo as well as the results of certain wiretaps on six phones at four different locations and certain observations by police officers involved in a physical surveillance of appellants. Appellants raise a number of challenges on appeal to the admissibility of the taped conversations obtained from the wiretaps.

The first claim is that the warrants authorizing the taps were not based upon probable cause and were not sufficiently particularized as to the offenses to be investigated. Without attempting to summarize the extensive affidavits accompanying the large number of requests for warrants, extensions, and amendments, suffice it to say that this court has reviewed them and found that probable cause existed as to each appellant, upon which the warrants could be based, including conversations pertaining to assorted criminal enterprises, including extortion, burglary, illicit gambling, felonious assault, etc., etc. We further find that against this massive backdrop of evidence of variegated criminal activity, the warrants described the offenses to be investigated with the requisite particularity. *Cf. United States* v. *Tortorello*, 480 F.2d 764, 778-81 (2d Cir.), *cert. denied*, 42 U.S.L.W. 3181 (U.S. Oct. 9, 1973).

Another claim is that there was a failure to minimize the wiretap interceptions as required by 18 U.S.C. § 2518 (5) and NYCPL 700.30(7). We have recently reviewed the minimization of these self-same wiretaps in *Rizzo I*, slip op. at 1491-95, and what we said there is equally applicable here. The prosecution fulfilled its burden by making a prima facie showing that minimization was achieved through the testimony of police officers who related how they ceased monitoring as soon as they could determine that the call was nonpertinent, and how they did not monitor privileged conversations. Defense counsel introduced no evidence to the contrary. In such a situation, the district court did not err in finding that minimization had been accomplished. *Rizzo I*, slip op. at 1495.

A related claim is that the warrants were invalid on their face because it did not explicitly call for minimization. Such a failure, however, we have stated in *United States* v. *Manfredi*, Nos. 72-2278-82 (2d Cir. Nov. 23, 1973), slip op. at 5593, 5610-12, is not necessarily fatal. There we said: "We feel it proper to read both the orders themselves and the minimization language of the supporting affidavits in 'a commonsense and realistic fashion.'" *Id.* at 5611. Here each affidavit stated that interception would be "executed in such a manner as to minimize the possibility of intercepting privileged or nonpertinent conversations." Moreover, the warrants themselves contained language that nothing shall be construed as authorizing overhearing or interception of any communication "which appears privileged or unrelated to the aforementioned crimes." In light of such language, the warrant fulfills the requirements of New York law. *United States* v. *Manfredi*, slip op. at 5612.

Appellant Rizzo advances the notion that because the eavesdrop applications for two of the tapped phones did

not explicitly specify that they were pay phones, the evidence obtained through those taps should be suppressed. Such an argument apparently was not made below, nor does appellant Rizzo cite to us a single case where wiretap evidence was suppressed for such a reason. Not only did the warrant protect the general public's privacy by limiting authorization to tap conversations of only certain individuals, but in fact the pay phones were not used by the general public, being used instead exclusively by Rizzo and his associates for their personal benefit.[3] Thus there can be no claim that the puplic's privacy was inadequately protected by virtue of the magistrate's ignorance of the fact that the phones were pay telephones.

18 U.S.C. § 2518(8)(d) requires that not later than 90 days after the termination of a tap the judge who issued the warrant must cause notice to be served on the person named in the order and, in the discretion of the judge, on any others whose conversations were overheard, that such a wiretap existed during a certain period. The New York CPL has a similar provision, § 700.50(3). Appellant Mizono claims that he did not receive the required notice. The first two calls about which Mizono complains involved conversations to which he was a party, but the warrants pursuant to which these conversations were overheard did not name Mizono as a party to be overheard. Thus, the court had to provide notice only at its discretion. There is no showing of abuse of discretion by not providing it within a certain time period. Four other conversations complained of were between Calise and appellant Heimerl in which mention was made of Mizono. Inasmuch as Mizono was neither named in the relevant warrant nor a party to the conversations he has no right to notice of the

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3 On one such phone, in Jimmy's Lounge, an "out of order sign" was posted over the coin slots of the pay phone used, so that the public would not use it.

taps under either New York or federal law. One call on May 10, 1972, falls within the mandatory requirements of notice under state and federal law, and yet no notice was given until December 18, 1972, a month later than it should have been, but still five months before the suppression hearing. We believe, as indicated in *United States* v. *Manfredi*, slip op. at 5618, that the touchstone to the determination whether to suppress wiretap evidence on a claim of failure of notice should be prejudice to the defendant. *See also People* v. *DiLorenzo*, 330 N.Y.S. 2d 720, 728 (Cty. Ct. 1971). Here no claim of actual prejudice has been made, nor do we see how it could be, and, thus, we find that the district court did not err in admitting evidence of that one telephone call.

Appellants further claim that interceptions of conversations dealing with counterfeiting, a crime not specified in the warrants, were not properly validated pursuant to 18 U.S.C. § 2517(5) and CPL § 700.65(4) as being made within the authorization of the warrants. This claim is belied by this court's holding in *United States* v. *Tortorello*, 480 F.2d 764, 781-83 (2d Cir.), *cert. denied*, 42 U.S.L.W. 3181 (U.S. Oct. 9, 1973), squarely allowing the procedure used here. Indeed, the facts here are for all intents and purposes identical to those in *Tortorello*.

Appellants Salli and DiLorenzo charge that there was insufficient independent evidence to establish their participation in the conspiracy so as to allow the use of hearsay evidence against them. Moreover, appellant Salli claims that in any case there was insufficient evidence to support his conviction of conspiracy, and that this failure of proof vitiates his conviction on the substantive count as well. As to Salli we have no difficulty in finding sufficient evidence both to support a finding that he was a participant in the conspiracy and to support a finding of guilt.

The independent evidence consisted of wiretapped conversations between Salli, Rizzo and DiLorenzo, the results of a physical surveillance, and the testimony of both Grant and Mayo as to the counterfeit money. While the wiretapped conversations are guarded enough so as not to specify that the callers were engaged in counterfeiting, the deliberately vague means of communicating and the unmistakable reference to fear of an informer working for Rizzo identify the object of the conversations as one not likely to be within the law. Only the evidence that this joint undertaking dealt with *counterfeiting* needed to be supplied. This indeed was done when Salli met with Rizzo and immediately thereafter Rizzo had possession for the first time of the counterfeit bills. While such evidence is circumstantial, that does not detract from its probative value. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). This evidence, therefore, met the test of demonstrating Salli's participation in the conspiracy "by a fair preponderance of the evidence independent of the hearsay utterances." *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Thereafter, the testimony by Grant referring to the promised 30 different serial numbers which were not actually supplied further involves Salli through Salli's conversation with Rizzo admitting that the 30 "styles of sweaters" originally promised were not delivered.

The same independent evidence which established Salli's participation in the conspiracy establishes DiLorenzo's participation. Interspersed among his cryptic intercepted conversations was the clear denial to Salli that there were any informants working with Rizzo; and DiLorenzo gave Rizzo the very directions to meet Salli as a result of which Rizzo first obtained possession of the counterfeit bills. This chain of independent evidence easily satisfies the "fair preponderance" requirement. The fact that Rizzo at

ne point told Grant not to talk to DiLorenzo about the ounterfeit bills is some evidence of the latter's nonpar- icipation, but is equally susceptible to the interpretation hat DiLorenzo, as Rizzo's boss, did not want to be directly inked with the transaction.

Appellants also challenge the admission into evidence of ertain counterfeit bills seized in Philadelphia on the ground hat there is no evidence that they are bills from this onspiracy. There was, however, ample evidence establish- ng that the bills offered in evidence had the same serial umber as the counterfeit money offered Mayo and Grant y Rizzo. Moreover, Rizzo's acknowledgment of sending ounterfeit bills to his friend, Benjamin, in Philadelphia nd their seizure corroborates that the bills offered in vidence were indeed from this conspiracy.

Appellant DiLorenzo also complains that his voice was nsufficiently identified in the wiretap conversations. Three etectives of the New York City Police Department identi- ied the tape-recorded voice as DiLorenzo's. We might ead to agree that the minimal exposure these detectives ad to appellant's voice makes their identification doubt- ul, but this doubt merely goes to the weight to be given o the detectives' testimony, not to the admissibility of he recordings. The jury was properly instructed as to he burden on the Government to connect the recordings o the defendants, and the jury could judge the testimony f the witnesses better than we can. The standard for the dmissibility of an opinion as to the identity of a speaker s merely that the identifier has heard the voice of the lleged speaker at any time. *United States* v. *Bonanno*, o. 73-1852 (2d Cir. Nov. 20, 1973) slip op. at 409, 418.

Appellants raise other claims which do not merit dis- ussion.

Judgments of conviction affirmed.

APPENDIX B

ORDER DENYING PETITION FOR REHEARING FILED FEBRUARY 28, 1974.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in a for the Second Circuit, held at the United States Court Hous the City of New York, on the 25th day of February, one thous nine hundred and seventy four.

Present:

HON. H.J. FRIENDLY

HON. W. FEINBERG

HON. J.L. OAKES

Circuit Judges Docket No. 73-2012

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

VINCENT RIZZO, et al.

Defendant-Appellant.

A petition for a rehearing having been filed herein by cou for the appellant, Matteo DiLORENZO

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied

s/A. Daniel Fusaro
A. Daniel Fusaro, Clerk

Filed Feb. 28, 1974
United States Court of Appeals
for the Second Circuit

A. Daniel Fusaro, Clerk